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May 21, 2019

Ex Parte Submission

Re: *CenturyLink Petition for Declaratory Ruling, WC Docket No. 10-90, CC Docket No. 01-92*

I write on behalf of AT&T Services, Inc. (“AT&T”) to address a number of *ex parte* filings recently submitted by CenturyLink.¹ The filings ostensibly offer support for its Petition for a Declaratory Ruling,² in which it asked the Commission to declare that its 2011 rules permit a provider of voice over internet protocol (“VoIP”) services to collect end office local switching access charges on over-the-top VoIP traffic, notwithstanding the D.C. Circuit’s decision that vacated and remanded the Commission’s prior ruling that such charges were permissible.³

CenturyLink’s recent filings fail completely to address the D.C. Circuit’s criticisms of the Commission’s prior order. Indeed, the AT&T decision is not mentioned—even once—in any of the multiple filings recently made by CenturyLink. Yet, as AT&T has explained, the D.C. Circuit set forth a series of issues that the Commission (and any supporters of end office charges on over-

¹ See, e.g., Letter from Joseph C. Cavender, CenturyLink, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 *et al.*, dated April 1, 2019 (“CenturyLink 4/1/19 *Ex Parte*”); Letter from Joseph C. Cavender, CenturyLink, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 *et al.*, dated March 27, 2019 (“CenturyLink 3/27/19 *Ex Parte*”); Letter from Joseph C. Cavender, CenturyLink, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 *et al.*, dated March 15, 2019 (“CenturyLink 3/15/19 *Ex Parte*”); Letter from John T. Nakahata, Counsel for CenturyLink, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 *et al.*, dated Nov. 28, 2018 (“CenturyLink 11/28/18 *Ex Parte*”); Letter from Joseph C. Cavender, CenturyLink, to Marlene H. Dortch, FCC, at 1, WC Docket Nos. 10-90 *et al.*, dated April 30, 2019 (“CenturyLink 4/30/19 *Ex Parte*”).

² Petition of CenturyLink for a Declaratory Ruling, WC Docket No. 10-90, at 1 (filed May 11, 2018) (“Pet.”).

³ *AT&T Corp. v. FCC*, 841 F.3d 1047 (D.C. Cir. 2016) (“AT&T”), *vacating and remanding*, Declaratory Ruling, *Connect America Fund*, 30 FCC Rcd. 1587 (2015) (“*Declaratory Ruling*”). The Commission set forth rules applicable to “VoIP-PSTN” traffic, including both facilities-based and over-the-top VoIP, in 2011. See 47 C.F.R. §§ 51.903, 51.913; *Transformation Order*, 26 FCC Rcd. 17663, ¶¶ 933-71 (2011).

the-top VoIP traffic) would need to address on remand.⁴ CenturyLink's failure to provide reasonable answers to these critical issues in its Petition and its recent *ex parte* filings is fatal to its request for declaratory ruling.

Rather than respond to the court's decision in *AT&T* or defend the arguments proffered in its Petition, CenturyLink's recent *ex parte* filings make new arguments that three of its most recent letters distill into four categories. CenturyLink 4/1/19 *Ex Parte* at 1-3; CenturyLink 3/27/19 *Ex Parte* at 1-3; CenturyLink 3/15/19 *Ex Parte* at 1-3.

Its most prominent new argument is confusing and highly technical, but CenturyLink seems to contend that, because distinguishing between facilities-based and over-the-top VoIP traffic may pose difficulties for certain types of business VoIP services, end office charges should always apply to all forms of over-the-top VoIP traffic. As explained below, this is meritless. The Commission already identified in 2011 the appropriate ways to deal with any such issues: to use existing information, to negotiate in good faith, and/or to develop proxies or a factor for use in billing. *See, e.g., Transformation Order*, ¶¶ 959, 960-63. Indeed, most if not all carriers (including CenturyLink and its affiliate Level 3) already have processes defined in their tariffs to address standard billing anomalies, such as factors for PIU (Percent Interstate Usage), PLU (Percent Local Usage), and PVU (Percent VoIP Usage). A similar process could be used to develop a factor to resolve over-the-top VoIP billing issues. CenturyLink's remaining three new arguments, which cite to (1) the *Transformation Order*'s NPRM, (2) the *RAO 21 Reconsideration Order*, 12 FCC Rcd. 10061 (1997) ("*RAO Recon Order*"), and (3) CenturyLink's tariff, are also meritless.

* * * *

1. CenturyLink's recent *ex parte* letters start with the premise that it is "impossible" for carriers to distinguish in particular call routing scenarios whether the carrier or its VoIP retail partner is providing over-the-top or facilities-based VoIP service.⁵ Under this view, carriers

⁴ *AT&T*, 841 F.3d at 1051-56; *see* Reply Comments of AT&T on CenturyLink Pet. for Decl. Ruling, WC Docket No. 10-90, at 2 (July 3, 2018) ("AT&T Reply Comments") (listing some of the primary issues that the D.C. Circuit identified in its decision); *see also* Comments of AT&T on CenturyLink Pet. for Decl. Ruling, WC Docket No. 10-90, at 3-4, 15-20 (June 18, 2018) ("AT&T Comments").

⁵ CenturyLink 11/28/18 *Ex Parte* at 1 ("it would be impossible" for AT&T to explain "which call scenarios permit a LEC to assess end office switching charges and which do not"); *see also* CenturyLink 3/4/19 *Ex Parte* at 11-14; CenturyLink 4/1/19 *Ex Parte* at 2.

cannot always determine whether to bill end office or tandem charges on particular calls.⁶ From these premises, CenturyLink makes an unjustified leap: it claims that there is no “non-arbitrary basis . . . for distinguishing among these and other arrangements to permit [end office] charges in some [scenarios] but not others.”⁷

In other words, CenturyLink asserts that, regardless of the text of the Commission’s 2011 rules or the clear meaning of its precedents, the LEC must be permitted to bill end office charges on all VoIP traffic, even where the traffic is indisputably over-the-top VoIP service, and neither the LEC or its VoIP partner performs the function of end office switching, *i.e.* interconnecting loops and trunks.

But the D.C. Circuit has already made clear that the 2011 rules turn on the principle of functional equivalence.⁸ That means the rules and “the *Transformation Order* allow a VoIP provider and its LEC partner . . . to charge for providing the ‘functional equivalent’ of end-office switching services, or tandem switching services, as the case might be.”⁹ Moreover, as the D.C. Circuit explained, Commission precedent establishes that the “*sine qua non*” of end office switching is “the interconnection of calls with last-mile facilities.”¹⁰ Accordingly, and as explained above and in AT&T’s Comments (at 4-15), a LEC-VoIP partnership may charge end office switching when it provides interconnection with last-mile facilities, and tandem switching charges when it does not.

⁶ For example, CenturyLink contends that, if a business uses a VoIP application such as Microsoft’s Skype for Business, the business’s employees may make calls that have a number of different call flows that would be billed differently under the 2011 rules. CenturyLink claims that such an employee may make some calls “in which the LEC has provided the connectivity to the PSTN, the VoIP service, and an IP-VPN over an MPLS connection to the caller’s premises” (end office), whereas at other times the employee may make calls that access the VoIP service via the Internet using third-party providers (tandem). See CenturyLink 11/28/18 *Ex Parte* at 3-5 (detailing various scenarios).

⁷ CenturyLink 11/28/18 *Ex Parte* at 5.

⁸ *AT&T*, 841 F.3d at 1049. Indeed, that is clear from the text of the rules themselves, see 47 C.F.R. §§ 51.903(d), (i) (defining services that can be tariffed in part based on functional equivalence).

⁹ *AT&T*, 841 F.3d at 1049. See also Dissenting Statement of Commissioner Ajit Pai, *Connect America Fund*, 30 FCC Rcd. 1587, 1615 (2015) (“Pai Dissent”) (“[p]utting this all together, a LEC may collect end office switching charges if and only if that LEC or its VoIP partner actually performs the functional equivalent of end office switching”); Dissenting Statement of Commissioner Michael O’Rielly, *Connect America Fund*, 30 FCC Rcd. 1587, 1620-21 (2015) (“O’Rielly Dissent”) (same).

¹⁰ *AT&T*, 841 F.3d at 1051; Pai Dissent, 30 FCC Rcd. at 1615 (“So what is the IP equivalent of end office switching? Our precedent makes clear that it is the interconnection of calls with last-mile facilities.”).

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CenturyLink has not identified any flaw in the principle that interconnection with loops distinguishes end office switching from tandem switching—nor could it, given the substantial precedent on this issue.¹¹ Nor does CenturyLink ever explain why that principle cannot be applied to the various scenarios it describes. The issue before the Commission is simply whether, under its 2011 rules, over-the-top LEC-VoIP partnerships provide the functional equivalent of end office switching, and CenturyLink’s identification of various call flows does not address that issue.¹²

Moreover, CenturyLink’s proposed solution to these call scenarios—the issuance of another declaratory ruling on a retroactive basis that end office switching charges have been permitted since 2011 on all over-the-top VoIP calls—is untenable and would be unlawful. There is nothing in the 2011 rules, the text of the *Transformation Order*, or the Commission’s precedents that even suggests that the Commission meant to allow end office switching on *all* VoIP calls, regardless of the functions actually being performed, merely because of perceived difficulties in identifying the functions (and thus the applicable rate) that LEC-VoIP partnerships provide on a subset of particular calls. Indeed, as explained below, the *Transformation Order* confirms that the

¹¹ See, e.g., *AT&T*, 841 F.3d at 1052-53, 1056; *RAO Recon Order*, ¶ 11; Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, FCC, at 6-8 & nn.11, 12, 13, 14, WC Docket No. 10-90 et al., dated January 17, 2013 (“AT&T 1/17/13 *Ex Parte*”); *AT&T Corp. v. YMax Commc’ns*, 26 FCC Rcd. 5742 (2011) (“*YMax Order*”); *Transformation Order*, ¶ 969; cf. *Pai Dissent* at 1619 (“it’s no surprise that VoIP providers performing differing functions would entitle LECs to differing intercarrier compensation, nor that a VoIP provider that interconnects a call with a customer’s last-mile facility performs the function of end office switching whereas a VoIP provider that transmits calls to an unaffiliated ISP for routing over the Internet does not”).

¹² CenturyLink’s focus on analogies to a PBX in the TDM world (and on business VoIP services in general) do not respond to the D.C. Circuit’s criticisms, for at least two reasons. See *CenturyLink 11/28/18 Ex Parte* at 2-4; *CenturyLink 3/4/19 Ex Parte* at 11-12. First, CenturyLink’s arguments are, at most, an argument about whether particular calls should be considered facilities-based or over-the-top; they do not call into question the underlying principle that end office charges are appropriate only where the LEC-VoIP partnership interconnects with last-mile facilities. CenturyLink’s Petition only requires the Commission to address the D.C. Circuit’s remand and articulate this general principle; the Commission at this juncture does not have to resolve more particularized disputes about whether specific types of calls are over-the-top. Second, even assuming, *arguendo*, that CenturyLink were right about these specific types of business services, it does not follow that the 2011 rules could or should be construed to permit end office charges for any other types of over-the-top VoIP calls.

opposite is true. CenturyLink's new argument is merely a *post hoc* rationalization (or an argument that the rule should be changed prospectively), not a valid interpretation of the 2011 rules.¹³

At most, CenturyLink has identified a purported *practical* problem of implementation. The solution to this issue, to the extent it exists, is not to abandon the principle of functional equivalence—indeed, the text of the rules prohibit CenturyLink from ignoring this principle (*e.g.*, 47 C.F.R. §§51.903(d), (i) (allowing charges when “functionally equivalent” services are provided). Rather, parties should rely on the mechanisms and considerations that the Commission already identified in the *Transformation Order*, such as the use of a factor. *Transformation Order*, ¶¶ 959-63.

The sort of potential problem CenturyLink claims to have identified is not new: LECs have used jurisdictional factors for decades in cases where it is difficult to determine whether a particular call is subject to interstate or intrastate charges.¹⁴ In this regard, the call scenarios that CenturyLink claims are “impossible” to bill properly also arose when intrastate access rates were different than interstate rates. For example, a caller might use a particular calling service in her office in Washington, D.C. to speak with a caller located in Virginia, and then place the same call using the same service (and same DC-based telephone number) remotely after taking the metro over the border to her home in Virginia. To bill intrastate or interstate access on those two calls (to the extent call detail records were insufficient), carriers developed various methods or factors to account for the nomadic nature of the service. They did not—as CenturyLink now suggests for VoIP calls—simply abandon ship and treat intrastate and interstate calls as identical. Even today, when the rates for interstate and intrastate calls are usually at parity, carriers often use factors or other methods and bill the traffic separately pursuant to interstate and intrastate tariffs. *See, e.g., Transformation Order* ¶ 963 & n.1991.

Notably, the *Transformation Order* itself contemplates the use of such factors. *E.g., Transformation Order*, ¶¶ 959-63. In that order, the Commission encouraged carriers to use “jurisdictional factors or the like” to distinguish toll VoIP-PSTN traffic from other VoIP-PSTN

¹³ *See AT&T*, 841 F.3d at 1054 (vacating and remanding because in the 2015 ruling “the Commission has not pointed to anything in the *Transformation Order* from which a reader would understand that it meant for specific services provided by over-the-top VoIP-LEC providers to qualify as the functional equivalent of end office switching and not tandem switching.”).

¹⁴ Moreover, although some VoIP services can be nomadic in nature (unlike most traditional fixed wireline services), wireless services are also nomadic, and carriers developed methods to bill access on wireless calls where the telephone number may not have provided “the actual geographic end points of a call.” *Transformation Order*, ¶ 962.

traffic, in light of the “recognized limitations of such information.”¹⁵ The Commission made clear that, absent negotiated arrangements, carriers would include specific tariff provisions to facilitate the use of such factors, including requirements for supporting information such as “traffic studies or other reasonable analysis that are subject to audit,” so long as they were a “reasonable tool (in addition to information the terminating LEC has about VoIP customers it is serving).” *Id.* ¶ 963. Many LECs—including CenturyLink’s Level 3 affiliate—have filed such tariff provisions, allowing them (i) to request information from access customers to determine the overall percentage of VoIP traffic and (ii) to verify and audit the information.¹⁶

So too if a LEC-VoIP partnership needs to determine the percentage of traffic that must be billed at no more than the tandem rate, it can establish a reasonable factor or come to some other agreed-upon arrangement.¹⁷ Consistent with the *Transformation Order*’s procedures, such a factor should be subject to audit, and the LECs should provide, upon request, the types of information listed in CenturyLink/Level 3’s current tariff, so their access customers can verify and/or audit the LECs’ charges for over-the-top VoIP traffic. *See, e.g.*, Att. A, § 3.4.10 (Level 3 factor verification process).

The bottom line, however, is that the Commission need not (and should not) further resolve these specific types of implementation issues in ruling on the Petition and responding to the remand in *AT&T*. The issue before the Commission is whether the 2011 rules permit a LEC-VoIP partnership providing over-the-top VoIP services to charge end office or tandem switching charges. As AT&T has explained, the only reasonable response to the D.C. Circuit’s remand is to issue a declaratory ruling confirming that the rule permits LEC-VoIP partnerships to assess only tandem charges for such over-the-top traffic. Carriers can work out, in the ordinary course of

¹⁵ *See Transformation Order*, ¶¶ 962-67 (to identify VoIP traffic, no “particular call detail information” is required but carriers can supplement such information with “the use of jurisdictional factors or the like”); *id.* ¶ 963 (carriers may use factors “in addition to information the terminating LEC has about VoIP customers it is serving”).

¹⁶ *E.g.*, Attachment A, Level 3 Communications, LLC, Tariff F.C.C. No. 4, §§ 3.4.6 (“Identification and Rating of VoIP-PSTN traffic); *id.* § 3.4.10 (“[Percent VoIP Usage (“PVU”)] Factor Verification”) (Level 3 can request an “overview of the process used to determine the PVU factors, the call detail records, description of the method for determining how the end user originates and terminates calls in IP format, and other information . . . in order to validate the PVU”).

¹⁷ *Transformation Order*, ¶¶ 812, 960, 963-64 (“Although we will allow tariffs during the transition to bill-and-keep, we reaffirm . . . that good-faith negotiations generally are preferable to tariffing as a means of implementing carriers’ compensation obligations”). Carriers can thus reach negotiated agreements as to the amounts of over-the-top VoIP traffic. Alternatively, to the extent the access revenues associated with a particular VoIP product that contains a mix of facilities-based and over-the-top VoIP calling are relatively small, a LEC may decide that it will forgo some access revenue and bill all of the access services on the mixed VoIP product as though it were all over-the-top VoIP calling.

business, the specifics of how factors may or may not apply to particular situations under that rule.¹⁸

2. CenturyLink also argues that the fact that the Commission expanded the scope of the final rule to cover all VoIP-PSTN traffic, rather than just interconnected VoIP services as proposed in the NPRM, somehow shows that the Commission intended end office switching charges to apply to all VoIP-PSTN traffic.¹⁹ CenturyLink is confusing two distinct issues. The *Transformation NPRM* actually cuts the other way: as CenturyLink acknowledges, the Commission specifically sought comment on whether the rules “should distinguish between facilities-based ‘fixed’ and ‘nomadic’ interconnected VoIP”—illustrating that the Commission already recognized that fixed and over-the-top VoIP services differed in important ways.²⁰

Although the final rule expanded the scope of the rule to all VoIP-PSTN traffic, the salient point for present purposes is that the Commission also adopted *both* an end office and a tandem charge, *both* of which turn on functional equivalence.²¹ The fact that a LEC-VoIP partnership may charge only for the services they provide, and that they may assess end office or tandem switching charges only if they provide the functional equivalent of such a service, establishes different compensation rules for “fixed” and “nomadic” VoIP services, as contemplated in the NPRM. The expansion of the final rule to all VoIP-PSTN services has nothing to do with the issue of whether end office or tandem charges apply to over-the-top VoIP traffic.

CenturyLink also claims that the Commission “rejected” AT&T’s argument that different rules should apply to fixed and nomadic VoIP, but CenturyLink is again confusing two distinct issues.²² After explaining in the text of the order that the rules permit a LEC to charge only for the “*functions performed* by it and/or by its retail VoIP partner,” *Transformation Order*, ¶ 970

¹⁸ In fact, CenturyLink and AT&T are already in litigation over the particulars of how factors may or may not apply to LEC-VoIP traffic that the companies bill each other for VoIP-PSTN traffic. *AT&T Corp. v. Level 3 Commc’ns, LLC*, No. 18-cv-00112-RM-MEH (D. Colo.); *compare* CenturyLink 11/28/18 *Ex Parte* at 6 (alluding to this litigation). This declaratory ruling proceeding does not require the Commission to resolve or opine on such issues.

¹⁹ See, e.g., CenturyLink 4/1/19 *Ex Parte* at 1-2; CenturyLink 3/4/19 *Ex Parte* at 9-11 (citing Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd. 4554, ¶ 612 (2011) (“*Transformation NPRM*”), and *Transformation Order* ¶ 941).

²⁰ See *Transformation NPRM* ¶ 612; see also *id.* ¶ 612 n.925 (equating “nomadic” VoIP with “over-the-top” VoIP). See CenturyLink 3/4/19 *Ex Parte* at 10; CenturyLink 4/1/19 *Ex Parte* at 1.

²¹ See *AT&T*, 841 F.3d at 1049 (citing 47 C.F.R. § 51.903(d) & (i); definition of “Tandem-Switched Access Service” in the rules “employs a similar ‘functional equivalent’ language”).

²² See CenturyLink 3/4/19 *Ex Parte* at 10-11 (citing *Transformation Order* ¶ 970 n.2025); CenturyLink 3/27/19 *Ex Parte* at 1-2.

(emphasis added), the Commission dropped a footnote rejecting the notion that permitting access charges on over-the-top VoIP calling would be imposing charges on “the Internet.”²³ The Commission’s point in the footnote related to the imposition of access charges in general, not end office charges. Contrary to its contention, CenturyLink has not pointed to any language in the *Transformation Order* in which the Commission “declined” to distinguish between fixed and nomadic VoIP services for purposes of intercarrier compensation.²⁴

3. Contrary to CenturyLink’s claims,²⁵ the *RAO 21 Reconsideration Order* supports the conclusion that over-the-top LEC-VoIP providers do not provide the functional equivalent of end office switching. Put simply, the D.C. Circuit has already recognized that precedents like the *RAO 21 Reconsideration Order* establish that “interconnection, *i.e.*, the actual connection of lines and trunks,” has always been considered the “*sine qua non*” of end office switching. *AT&T*, 841 F.3d at 1052 (quoting *RAO Recon Order*, ¶ 11). As the D.C. Circuit noted, the Commission could ignore these precedents in the *Declaratory Ruling* only by abandoning its longstanding approach to “functional equivalence” analysis. *AT&T*, 841 F.3d at 1052. As AT&T has explained, however, nothing in the rules or the *Transformation Order* suggests the Commission intended to adopt a special functional equivalence test for VoIP services.²⁶ To the contrary, the *Transformation Order* expressly re-adopted the Commission’s “long standing policy” that LECs “‘should charge only for those services that they provide.’”²⁷

CenturyLink also misses the point in suggesting, incorrectly, that AT&T has argued that the ISP in an over-the-top VoIP call performs end office switching.²⁸ Again, a LEC-VoIP partnership may bill for end office switching only if that partnership performs the actual

²³ *Id.* ¶ 970 n.2025 (“we likewise reject claims that permitting the LEC partners of a retail VoIP provider to charge the same intercarrier compensation as other LECs would be broadly imposing access charges on the Internet”).

²⁴ Compare CenturyLink 4/1/19 *Ex Parte* at 1.

²⁵ See, e.g., CenturyLink 4/1/19 *Ex Parte* at 2; CenturyLink 3/4/19 *Ex Parte* at 5-6.

²⁶ See AT&T Comments at 11-13, 15-16; Pai Dissent, 30 FCC Rcd. at 1618 (“the VoIP Symmetry Rule did not adopt any test regarding functionality,” and its use of the term “functional equivalent,” which was “codified in other rules” and was “nothing new,” and means that “the FCC implicitly adopted its accompanying precedent”); cf. *AT&T*, 841 F.3d at 1052.

²⁷ *Transformation Order* ¶ 970 n.2020 (quoting *Eight Report and Order*, ¶ 21). See also Pai Dissent, 30 FCC Rcd. at 1618 (functional equivalence test was “codified in other rules,” and was “more than a decade old when the FCC adopted the [*Transformation Order*]”); O’Rielly Dissent, 30 FCC Rcd. at 1620 (“Over several decades, the Commission has given meaning to the key terms at issue here; namely, ‘end office switching’ and ‘functional equivalent.’”).

²⁸ CenturyLink 3/4/19 *Ex Parte* at 6 (citing AT&T Comments at 18); CenturyLink 3/27/19 *Ex Parte* at 2.

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interconnection of trunks and loops. AT&T's point is that the ISP is the only entity in the call flow of an over-the-top VoIP call that has any facility that could be considered analogous to, or the "functional equivalent" of, a *loop*. See AT&T Comments at 18-19. Since the LEC-VoIP partnership is not providing interconnection with any such loop facility, it cannot be providing the functional equivalent of end office switching. Indeed, permitting LEC-VoIP partnerships to charge for end office switching in such circumstances would promote harmful arbitrage, because over-the-top LEC-VoIP partnerships have not made the sort of investments in neighborhood facilities that would justify end office switching's higher rates.²⁹

4. CenturyLink also contends that a "straightforward reading of incumbent LEC tariffs confirms that such tariffs apply to over-the-top VoIP traffic" and permit end office switching charges on those calls. *E.g.*, CenturyLink March 15 *Ex Parte*, at 2. CenturyLink's arguments are wrong.³⁰ AT&T long ago explained that the tariffs of incumbent LECs—including CenturyLink—have consistently employed a definition of end office switching that expressly requires interconnection. See, *e.g.*, AT&T 1/17/13 *Ex Parte* at 11 & Att. B (attaching tariff excerpts).

In particular, CenturyLink's tariffs have for years defined an "End Office Switch" as "a local Company switching system where Telephone Exchange Service customer station loops are terminated for purposes of interconnection to trunks."³¹ CenturyLink's definition of an end office switch is consistent with decades of precedent incorporated in the 2011 rules.³²

²⁹ See AT&T Comments at 17-19; see also O'Rielly Dissent, 30 FCC Rcd. at 1621 ("The charges for end office switching have been so high precisely because of the substantial costs of performing the function of connecting trunks and loops; costs that are not justified if providers simply place calls onto the Internet. Allowing such providers to pocket the difference does nothing to guarantee that they will use it to deploy IP networks. But it does promote artificial competition, marketplace distortions, and arbitrage"); *YMax Order*, ¶ 40.

³⁰ CenturyLink's analogy to an ILEC's delivery of calls to a TDM PBX (CenturyLink 3/4/19 *Ex Parte* at 11-12) is flawed. In sending a call to a PBX, the ILEC has both delivered a call to an end user and performed interconnection, *i.e.*, it has taken a call from trunks and placed it on a tangible loop facility terminated to the PBX (even if the PBX performed further routing). By contrast, on an over-the-top call, the LEC-VoIP partnership does not perform this interconnection function—rather, it places the calls on the public Internet.

³¹ See Att. B (CenturyLink Op. Cos., Tariff F.C.C. No. 11, § 2.6, 1st Rev. Page 2-87) (emphasis added).

³² See, *e.g.*, *RAO Recon Order*, 12 FCC Rcd. 10061, ¶ 11 ("interconnection, *i.e.*, the actual connection of lines and trunks, is the characteristic that distinguishes end office switching"); *AT&T*, 841 F.3d at 1051, 1056; *YMax Order*, ¶ 40 (end office switching charges are "authorized by law to allow local exchange carriers to recover the substantial investment required to construct the tangible connections between themselves and their customers throughout their service territory"); AT&T 1/17/13 *Ex Parte* at 6-8 & nn.11, 12, 13, 14 (citing many precedents); see also 47 C.F.R. § 51.903(d) (defining "End Office Access Service" as the "functional equivalent" of ILEC access service, including ILEC "local switching rate elements").

CenturyLink's tariffs further provide that it may bill a "Local Switching" charge only when CenturyLink "provides the local end office switching, end user line termination, and intercept functions necessary to complete the transmission of Switched Access Communications to and from end users."³³ In other words, CenturyLink's tariffs authorize local switching charges when CenturyLink provides "end user line termination" and "local end office switching . . . functions"—and an end office switch function is defined as the termination of customer loops "for purposes of interconnection to trunks." *See* Att. B.

Contrary to the claims in CenturyLink's recent *ex parte* filings, end office switching charges on over-the-top VoIP calls are prohibited by a "straightforward" reading of CenturyLink's tariffs. On over-the-top VoIP calls, LECs "do not provide interconnection" and "do not supply a last-mile connection." *AT&T*, 841 F.3d at 1054, 1056. CenturyLink's tariffs therefore prohibit end office charges on over-the-top VoIP calls, because the LEC does not provide any "end office switching . . . functions" or any "end user line termination," as those terms are defined in the tariffs and by the Commission's precedents.

CenturyLink's claims that the language in its tariff allows end office switching charges on over-the-top VoIP calls are flawed and have been already rejected by the Commission and courts. According to CenturyLink, end office charges are appropriate because a LEC's VoIP partner is an "end user" under the tariffs. *See* CenturyLink 3/4/19 *Ex Parte* at 11-12. This is meritless. To begin with, the VoIP partner is not the "end user" on an over-the-top VoIP call—rather, the "end user" is the entity that places or receives an over-the-top VoIP call.³⁴ The VoIP provider is not situated at the beginning or end point of an over-the-top VoIP call, but merely performs a limited, intermediate routing role where it places calls on the public Internet, so that other broadband service providers route the calls to the actual "end users." In fact, nothing in the 2011 rules or the *Transformation Order* even remotely suggests that VoIP providers are "end users" for purposes of assessing access charges; to the contrary, the *Order* recognizes that VoIP providers "take the position that they are offering unregulated services" to end users. *Transformation Order*, ¶ 970.³⁵

³³ Att. B (CenturyLink Op. Cos., Tariff F.C.C. No. 11, § 6.1.2, 1st Rev. Page 6-37); *see also id.* § 6.2, 1st Rev. Page 6-45 (entitled "Provision and Description of Switched Access Service;" "The provision of each type of Switched Access Service requires . . . [*inter alia*] the appropriate local switching functions").

³⁴ *See, e.g., Qwest Commc'ns v. Farmers*, 22 FCC Rcd. 17973, ¶ 31 (2007) ("Qwest correctly notes that only a carrier whose facilities are used to originate or terminate a call may impose access charges. The Commission has generally used an 'end-to-end' analysis in determining where a call terminates.").

³⁵ In a closely related context, the Commission has rejected the view that a VoIP provider could be an end user. *See, e.g., Numbering Policies for Modern Communications*, 30 FCC Rcd 6839, ¶¶ 28, 30, 32 (2015) (distinguishing between "end users" and "interconnected VoIP providers or other non-carrier entities" that may be assigned telephone numbers by a carrier; such VoIP providers "*do not qualify as 'end users' or 'customers'*") (emphasis added).

In any event, even if the VoIP partner were an end user within the meaning of the tariff, CenturyLink's tariffs would still prohibit end office charges on over-the-top VoIP calls. In addition to routing calls to end users, LECs that bill end office switching charges must do so consistently with the terms of the tariff that describe that rate element.³⁶ As described above, on over-the-top VoIP calls, CenturyLink does not comply with the terms of its tariff that limit its end office switching charges—namely, on such calls, CenturyLink does not provide any “end office switching . . . functions” or any “end user line termination,” as those terms are defined in the tariffs.

Both the Commission and the courts have determined that tariff language similar to that employed by CenturyLink prohibits end office switching charges on over-the-top VoIP calls. In the *YMax Order*, the Commission concluded that a LEC's tariff—which was “model[led]” on “common language” found in ILEC tariffs—prohibited end office charges on over-the-top VoIP calls because it did not operate any “end office switches” as defined in the tariff.³⁷ Under the tariff, which is similar in relevant part to that of CenturyLink, end office switching required termination of end user lines for the purposes of interconnection with trunks, and the Commission determined that, on the over-the-top VoIP calls, the carrier did “not provide any physical transmission facilities” that established point-to-point connections to the called or calling parties. *Id.* ¶ 41. As such “the [t]ariff [did] not authorize [the LEC] to assess End Office Switching charges.”³⁸

CenturyLink's arguments that its tariffs allow end office charges on over-the-top traffic—like much of its advocacy in this docket—simply fail to grapple with these precedents. *See AT&T*, 841 F.3d at 1056 (“*YMax I* represents the Commission's apparent understanding of the ‘commonly understood meaning’ of end office switching around the time of the *Transformation Order*”).

Finally, CenturyLink's glib assertion that the positions of AT&T, Verizon, Chairman Pai, Commissioner O'Rielly, and the D.C. Circuit panel are “akin to saying that end office switching

³⁶ To collect under a tariff, a LEC must establish that (1) it has a valid, lawful tariff on file, and (2) it “provide[d] its services in exactly the way the carrier describes them in that tariff.” *CoreTel Va. v. Verizon*, 752 F.3d 364, 374 (4th Cir. 2014). In *CoreTel*, the court held that, in order to collect end office charges, the carrier had to comply with the tariff's “more specific definition of the particular type of switched access service at issue, end-office switched access.” *Id.* at 375.

³⁷ *YMax Order*, ¶¶ 14, 36-39. In *YMax*, the carrier's tariff provided in relevant part that “[t]he End Office Switching rate category establishes the charges related to the use of end office switching equipment, [and] the terminations in the end office of end user lines . . .” *Id.* n.107. An “end office switch” was defined as a place “where Customer or End User station loops are terminated for purposes of interconnection to other station loops, trunks, or access facilities.” *Id.* ¶ 37. These are similar to the terms of CenturyLink's tariffs.

³⁸ *Id.* The same result occurred in *CoreTel*, where the carrier's tariff was similar to that at issue in the *YMax Order*, and the court held that “the language of CoreTel's end-office switching service does not permit that specific tariff rate to be applied when CoreTel delivers calls to customers over the public Internet rather than using a physical facility ow[n]ed by CoreTel.” 752 F.2d at 375.

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charges apply to calls made by left-handed people, but not by right-handed people” (CenturyLink 4/30/19 *Ex Parte* at 3-4) is a gross mischaracterization. Under the 2011 rules, there is a clear and rational reason why end office switching may not be billed on over-the-top VoIP calls: the LEC-VoIP entities do not perform any interconnection function, and instead merely place calls on the public Internet.³⁹ The Commission should confirm that this is the only reasonable reading of its rules and precedents, and respond to the remand in *AT&T* by denying CenturyLink’s Petition.

Sincerely,

/s/ James P. Young

James P. Young

Attorney for AT&T Services, Inc.

³⁹ *See, e.g.*, Pai Dissent 30 FCC Rcd. at 1615 (under the 2011 rules, “a LEC may collect end office switching charges if and only if that LEC or its VoIP partner actually performs the functional equivalent of end office switching. So what is the IP equivalent of end office switching? Our precedent makes clear that it is the interconnection of calls with last-mile facilities.”); O’Rielly Dissent, 30 FCC Rcd. at 1620 (“we also know that intermediate routing, such as merely placing calls onto the public Internet, does not count” as the functional equivalent of end office switching); *AT&T*, 841 F.3d at 1051-56; *AT&T* 1/17/13 *Ex Parte*.

ATTACHMENT A

(Excerpts of Level 3 Access Tariff on
PVU Factor and Verification)

REGULATIONS AND SCHEDULE OF
CHARGES APPLICABLE TO INTERSTATE AND INTERNATIONAL
SWITCHED ACCESS SERVICES
FURNISHED BY LEVEL 3 COMMUNICATIONS, LLC
AND ITS CONCURRING CARRIERS BETWEEN
POINTS IN THE UNITED STATES AND
BETWEEN POINTS IN THE UNITED STATES AS SPECIFIED HEREIN

Issued: May 7, 2002

Effective: May 8, 2002

Issued by: Thomas C. Stortz, Group Vice President and General Counsel
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021

SECTION 3 – OBLIGATIONS OF THE CUSTOMER (CONT'D)**3.4.6 Identification and Rating of VoIP-PSTN Traffic**

This section governs the identification of VoIP-PSTN Traffic that is required to be compensated at interstate access rates unless the parties have agreed otherwise by the F.C.C. in its Report and Order in WC Dockets Nos. 10-90, etc., F.C.C. Release No. 11-161 (November 18, 2011) (F.C.C. Order). Specifically, this section establishes the method of separating VoIP-PSTN Traffic from the Customer's traditional intrastate access traffic, so that VoIP-PSTN Traffic can be billed in accordance with the F.C.C. Order. VoIP-PSTN Traffic identified in accordance with this tariff section will be billed at rates equal to the Company's applicable tariffed interstate switched access rates as set forth in Section 15, following.

(M)

Calculation and Application of Percent-VoIP- Usage Factors

- a. The Company will determine the number of VoIP-PSTN Traffic minutes of use (MOU) to which interstate rates will be assessed by applying an originating Percent VoIP Usage (PVU) factor to the total intrastate access MOU originated by a Company end user and delivered to the Customer and by applying a terminating PVU factor to the total intrastate access MOU terminated by a Customer to the Company's end user.
- b. The Customer will calculate and furnish to the Company an originating PVU factor representing the whole number percentage of the Customer's total originating intrastate access MOU that the Customer exchanges with the Company in the LATA that is received from the Company and that is terminated in IP format and that would be billed by the Company as intrastate access MOU.
- c. The Customer will calculate and furnish to the Company a terminating PVU factor representing the whole number percentage of the Customer's total terminating intrastate access MOU that the Customer exchanges with the Company in the LATA that is sent to Company and which originated in IP format and that would be billed by the Company as intrastate access MOU.
- d. The Customer shall not modify their reported PIU factor to account for VoIP-PSTN Traffic.
- e. Both the Customer provided originating PVU and the terminating PVU shall be based on information such as the number of the Customer's retail VoIP subscriptions in the state (e.g. as reported on F.C.C. Form 477), traffic studies, actual call detail or other relevant and verifiable information which will be provided to the Company upon request.

(M)

(M1)

(M) Material moved from Page 19.

(M1) Material moved to Page 19.2.

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Effective: July 18, 2018

Issued by: General Counsel – Regulatory Policy
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021

Filed Under Transmittal No. 6

SECTION 3 – OBLIGATIONS OF THE CUSTOMER (CONT'D)

Calculation and Application of Percent-VoIP- Usage Factors (Cont'd)

- f. The Customer shall retain the call detail, work papers, and information used to develop the PVU factors for a minimum of one year. (M)
- g. The Company shall use default factors until such time as Customer supplies such factors. For this purpose, Company will utilize a PVU equal to the percentage of VoIP subscribers in the state based on the Local Competition Report, as released periodically and/or such other reports as the Company deems appropriate and reasonable. Under the Local Competition report methodology, the PVU will be the total number of incumbent LEC and non-incumbent LEC VoIP subscriptions in a state divided by the sum of those reported VoIP subscriptions plus incumbent LEC and non-incumbent LEC switched access lines.
- 3.4.7 The preceding section 3.4.6 will be applied to the billing of switched access charges to a Customer that is a local exchange carrier only to the extent that the Customer has also implemented billing of interstate access charges for VoIP-PSTN Traffic in accordance with FCC orders, rules and regulations.
- 3.4.8 Initial Implementation of PVU Factors
- a. If the PVU factors cannot be implemented in the Company's billing systems by December 29, 2011, once the factors can be implemented the Company will adjust the Customer's bills to reflect the PVU factors prospectively in the next bill period if the PVU factors are provided by the Customer to the Company prior to April 15, 2012.
- b. The Company may choose to provide credits based on the reported PVU factors on a quarterly basis until such time as the billing system modifications can be implemented.
- 3.4.9 PVU Factor Update
- The Customer may update the PVU factors quarterly using the method set forth in 3.4.6.1.c, preceding. If the Customer chooses to submit such updates, it shall forward to the Company, no later than 15 days after the first day of January, April, July and/or October of each year, revised PVU factors based on data for the prior three months, ending the last day of December, March, June and September, respectively. The revised PVU factors will serve as the basis for future billing and will be effective on the bill date of each such month and shall serve as the basis for subsequent monthly billing until superseded by new PVU factors. No prorating or back billing will be done based on the updated PVU factors. (M)

(M) Material moved from Page 19.1.

(M1) Material moved from Pages 19.3. and 19.4.

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SECTION 3 – OBLIGATIONS OF THE CUSTOMER (CONT'D)**3.4.10. PVU Factor Verification**

(M)

- a. Not more than twice in any year, the Company may request from the Customer an overview of the process used to determine the PVU factors, the call detail records, description of the method for determining how the end user originates and terminates calls in IP format, and other information used to determine the Customer's PVU factors furnished to the Company in order to validate the PVU factors supplied. The Customer shall comply, and shall reasonably supply the requested data and information within 15 days of the Company's request.
- b. The Company may dispute the Customer's PVU factor based upon:
 - A review of the requested data and information provided by the Customer,
 - The Company's reasonable review of other market information, F.C.C. reports on VoIP lines, such as F.C.C. Form 477 or state level results based on the F.C.C. Local Competition Report or other relevant data.
 - A change in the reported PVU factor by more than five percentage points from the preceding quarter.
- c. If after review of the data and information, the Customer and the Company establishes revised PVU factors, the Company will begin using those revised PVU factors with the next bill period.

(M)

(M) Material moved from Page 19.2.

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SECTION 3 – OBLIGATIONS OF THE CUSTOMER (CONT'D)**3.4.10. PVU Factor Verification (Cont'd)**

d. If the dispute is unresolved, the Company may initiate an audit. The Company shall limit audits of the Customer's PVU factor to no more than twice per year. The Customer may request that the audit be conducted by an independent auditor. In such cases the associated auditing expenses will be paid by the Customer.

- In the event that the Customer fails to provide adequate records to enable the Company or an independent auditor to conduct an audit verifying the Customer's PVU factors, the Company will bill the usage for all contested periods using the most recent undisputed PVU factors reported by the Customer. These PVU factors will remain in effect until the audit can be completed.
- During the audit, the most recent undisputed PVU factors from the previous reporting period will be used by the Company.
- The Company will adjust the Customer's PVU factors based on the results of the audit and implement the revised PVU in the next billing period or quarterly report date, whichever is first. The revised PVU factors will apply for the next two quarters before new factors can be submitted by the Customer.
- If the audit supports the Customer's PVU factors, the usage for the contested periods will be adjusted to reflect the Customer's audited PVU factors.

(M)

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(M) Material moved from Page 19.2.

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ATTACHMENT B

(Excerpts of CenturyLink Access Tariff on
End Office Switch and Local Switching)

ACCESS SERVICE

REGULATIONS, RATES AND CHARGES

Applying to the provision of Access Services
within a Local Access and Transport Area (LATA)
or equivalent market areas for
Connection to Interstate Communications Facilities
for Customers within the operating territory of

Qwest Corporation d/b/a CenturyLink QC
in the State(s) of

Arizona (AZ) (Company Code [CC] 5101)
Colorado (CO) (CC 5102)
Idaho (ID - Boise LATA) (CC 5103)
Idaho (ID - Spokane LATA) (CC 5162)
Iowa (IA) (CC 5141)
Minnesota (MN) (CC 5142)
Montana (MT) (CC 5104)
Nebraska (NE) (CC 5143)
New Mexico (NM) (CC 5105)
North Dakota (ND) (CC 5144)
Oregon (OR) (CC 5163)
South Dakota (SD) (CC 5145)
Utah (UT) (CC 5107)
Washington (WA) (CC 5161)
Wyoming (WY) (CC 5108)

as provided herein

Access Services are provided by means of wire, fiber optics, radio or
any other suitable technology or a combination thereof.

This Tariff replaces Qwest Corporation Tariff F.C.C No. 1.

* This entire Tariff is issued under the authority of Special Permission No. 13-005.

ACCESS SERVICE

2. GENERAL REGULATIONS

2.6 DEFINITIONS (Cont'd)

End Office Switch

The term "End Office Switch" denotes a local Company switching system where Telephone Exchange Service customer station loops are terminated for purposes of interconnection to trunks. Included are Remote Switching Modules and Remote Switching Systems served by a host office in a different wire center.

End User

"End User" means any customer of an interstate or foreign telecommunications service that is not a carrier, except that a carrier (other than a telephone company) shall be deemed to be an "end user" when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originates or terminates on the premises of such reseller.

Entrance Facility

The term "Entrance Facility" denotes (1) the dedicated Switched Access transport facility from the customer's premises or point of demarcation to the Company serving wire center or (2) the fiber optic cable from the Virtual Expanded Interconnection - Collocation (EIC) point of interconnection utilizing Company-owned conventional single mode type of fiber optic cable to the Virtual interconnector-designated equipment.

Entry Switch

See "First Point of Switching".

Envelope Delay Distortion (EDD)

The term "Envelope Delay Distortion" denotes a measure of the linearity of the phase versus frequency of a channel.

Equal Level Echo Path Loss (ELEPL)

The term "Equal Level Echo Path Loss" denotes the measure of Echo Path loss at a 4-wire interface which is corrected by the difference between the send and receive Transmission Level Point (TLP). [ELEPL = EPL - TLP (send) + TLP (receive)].

ACCESS SERVICE**6. SWITCHED ACCESS SERVICE****6.1 GENERAL****6.1.2 RATE CATEGORIES (Cont'd)****B. Local Switching**

The Local Switching rate category provides the local end office switching, end user line termination and intercept functions necessary to complete the transmission of Switched Access Communications to and from the end users served by the local end office. The Local Switching rate categories are described following. Local Switching rates are set forth in 6.8, following. The application of these rates with respect to the different types of service is as set forth in 6.7.1, following.

1. Local End Office Switching Functions**a. Common Switching**

Common Switching provides the local end office switching functions associated with the various access switching arrangements. The services arrangements (e.g., Features Group Arrangements and BSAs) are described in 6.2, following.

Included as part of Common Switching are various optional features and BSEs which the customer can order to meet its specific communications requirements. These optional features and BSEs are described in 6.3.1, following.

b. Transport Termination

Transport Termination provides for the lineside or trunkside arrangements which terminate the Switched Transport facilities. Included as part of Transport Termination are various optional termination arrangements and BSEs. These optional terminating arrangements and BSEs are described in 6.3.2, following.

The number of Transport Terminations provided for the lineside or trunkside arrangement will be determined by the Company as set forth in 6.5.8, following. The number of transmission paths will be determined as set forth in 6.5.7, following.

ACCESS SERVICE**6. SWITCHED ACCESS SERVICE****6.2 PROVISION AND DESCRIPTION OF SWITCHED ACCESS SERVICE**

Switched Access Service is provided in different serving arrangements. The provision of each type of Switched Access Service requires transport facilities (Entrance Facilities, DTT facilities, and TST facilities for tandem routed traffic), multiplexing equipment and the appropriate local switching functions. In addition, WATS Access Lines, as provided in Section 7, following, may, at the option of the customer, be provided for use with Lineside and Trunkside Access.

Transmission Types (i.e., A1, B, B1 and C) have been identified for the provision of Switched Access Services. The Transmission Types are dependent on the Interface Group and the routing of the service, i.e., whether the service is routed directly to the end office or via an access tandem. The standard parameter limits for the Transmission Types are set forth in 6.4, following, and in Technical Reference GR-334-CORE.

Serving arrangements are arranged for either originating, terminating or two-way calling, based on the customer end office switching capacity ordered. Originating calling permits the delivery of calls from Telephone Exchange Service locations to the customer's premises. Terminating calling permits the delivery of calls from the customer's premises to Telephone Exchange Service locations. Two-way calling permits the delivery of calls in both directions, but not simultaneously. The Company will determine the type of calling to be provided unless the customer requests that a different type of directional calling is to be provided. In such cases, the Company will work cooperatively with the customer to determine the directionality.

There are various optional features and BSEs available with Switched Access Service. These additional features are provided as Switched Transport, Common Switching, Transport Termination and Line Termination.

Following are detailed descriptions of each of the available Switched Access Services. Each service is described in terms of its specific physical characteristics and calling patterns, the transport provisioning, the transmission specifications with which it is provided, the optional features and BSEs available for use with it and the standard testing capabilities.

The Common Switching, Transport Termination, and Line Termination optional features and BSEs, which are described in 6.3, following, unless specifically stated otherwise, are available at all Company end office switches.